

J. Hörnle: Arbitration Clause in B2C e-Commerce Contracts

LEGAL CONTROLS ON THE USE OF ARBITRATION CLAUSE IN B2C E-COMMERCE CONTRACTS

by

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This article reviews the law on the enforceability of consumer arbitration clauses and discusses whether such clauses would be enforceable if contained in B2C e-commerce contracts. In so doing, it makes a distinction between pre- and post dispute arbitration clauses.

The article discusses and analyses arbitrability and the control of unfair contract terms in two major common law jurisdictions, namely the UK and the US. For this analysis the article compares and contrasts the control of unfair contract terms in the UK with the doctrine of unconscionability of certain adhesion clauses in the US. The UK law in this area is largely based on an EU Directive (Directive 93/13/EEC on unfair terms in consumer contracts) and its implementing Regulations (Unfair Terms in Consumer Contracts Regulations 1999). However in addition, national law (the Arbitration Act 1996) provides for additional consumer protection.

KEYWORDS

Arbitration, e-commerce, consumers, consumer protection, arbitration agreement, enforceability, European Union, UK and US law

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INTRODUCTION [1]

The aim of this article is to analyse whether arbitration clauses in consumer B2C contracts are upheld by the courts in the UK and the US¹ and comparing the respective approaches on both sides of the Atlantic.

The article discusses the distinction between pre- and post-dispute consumer arbitration clauses and arbitrability of consumer disputes. It then analyses the control of non-negotiated contract terms in B2C e-commerce contracts in two major common law jurisdictions, namely the UK and the US.

For this analysis the article compares and contrasts the control of unfair contract terms in the UK with the doctrine of unconscionability of certain adhesion clauses in the US. The UK law in this area is largely based on an EC Directive (Directive 93/13/EEC on unfair terms in consumer contracts) and its implementing Regulations (Unfair Terms in Consumer Contracts Regulations 1999). However in addition, national law (passed under the Arbitration Act 1996) provides for additional consumer protection.

It may be more difficult for e-commerce suppliers than for offline suppliers to locate where their customers are and, for this reason, e-commerce suppliers are concerned about liability exposure on a global basis. From the consumer's perspective, cross-border litigation may be more daunting than arbitration, but arbitration may not be geared towards consumer protection.

One way to address the multi-jurisdictional litigation conundrum in e-commerce is to include an arbitration clause in B2C e-commerce contracts. This solution, however, raises the question of the enforceability of such clauses. This article will examine to what extent suppliers are able to force their global consumer-customers to arbitrate any dispute arising from the e-commerce contract, focusing on the approach taken by UK and US law.

CONSUMERS' AGREEMENT TO ARBITRATION [2]

An arbitration contract or clause involves a waiver of the right to go to court² (which, as a waiver of a right, requires consent) and an agreement, by which the parties undertake an obligation to take part in the arbitration pro-

¹ In the brief space allowed in this article, no distinction can be made between different state jurisdictions and the federal jurisdiction.

² See, for example Article 6 (1) of the European Convention of Human Rights (ECHR) of 4. November 1950, signed at Rome TS 71 (1953) Cmd 8969; ETS No5 1950

cedure (which also requires consent). This consent should be voluntary and fully informed.³ However it is questionable whether in the B2C context, consent to arbitration complies with these requirements, as there may be a lack of choice of options⁴ due to market failures caused by the imposition of standard contract terms by the more powerful (business) party.

The policy concern with arbitration clauses is that, in a B2C e-commerce situation, where the supplier includes an arbitration clause in the standard form contract, the consumer is in a far inferior bargaining position.⁵ In fact, it can be said that the consumer is in no bargaining position at all, as the contract is offered on a 'take it, or leave it' basis. For this reason, it is likely that the consumer has not read the standard terms and conditions (even if there was a clear link from the ordering webpage) and that the consumer is not even aware that there is an arbitration clause in the contract.⁶ Even if the consumer has seen the clause, he or she may not appreciate its significance. Because of this imbalance in their bargaining position, suppliers may choose arbitration processes which are unfair to consumers. Furthermore consumer groups have long argued that consumers should not be bound by pre-dispute arbitration clauses.⁷

³ D Beyleveld and R Brownsword: 'it is implicit in the idea of consent that it should be given on a free and informed basis', *Consent in the Law* (Hart Oxford and Portland 2007) 13

⁴ The question here is whether the lack of choice is of such a nature as to mean that there is such pressure on the person that they feel forced to accept an option they would otherwise not have chosen, see D Beyleveld and R Brownsword fn 143

⁵ R Alderman 'Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform' (Winter 2001) 38 *Houston Law Review* 1237-1268, 1246 et sequi; P Carrington 'Regulating Dispute Resolution Provisions in Adhesion Contracts' (Winter 1998) 35 *Harvard Journal on Legislation* 225-231, 226; J Sternlight 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (Fall 1996) 74 *Washington University Law Quarterly* 637-712, 676-677

⁶ See also Case C-168/05 *Mostaza Claro v Centro Movil* [2007] 1 CMLR 22 (ECJ) para 25

⁷ M Doyle, K Ritters and S Brooker *Seeking Resolution* Research Report published by the DTI and the National Consumer Council in January 2004 URN 03/161678; see Consumers International 'Disputes in Cyberspace' December 2000, ISBN 19023 91 31 6229-30 (Recommendations) and see also Principle VI, 2nd Sentence of EC Recommendation 98/257/EC; see also the AAA Consumer- Related Disputes Supplementary Procedures of 15. September 2005, available from <http://www.adr.org/sp.asp?id=22014> and the AAA Due Process Protocol for Consumers Principle 5; BEUC Position Paper 'Alternative Dispute Resolution' of 21. November 2002 BEUC/X/048/2002, pp.5-6; TACD (Transatlantic Consumer Dialogue) 'Alternative Dispute Resolution in the Context of E-commerce' Position Statement of February 2000, E-comm 12-00, Resolution No 4 available from <http://www.tacd.org/cgi-bin/db.cgi?page=view&config=admin/docs.cfg&id=41>

PRE- AND POST DISPUTE ARBITRATION CLAUSES [3]

In the discussion of this imbalance in the bargaining power between suppliers and consumers, an important distinction must be made between pre- and post-dispute arbitration agreements. A B2C arbitration agreement entered into before the dispute has arisen is potentially unfair, as at that point the consumer is likely to be unaware of its significance. The consumer is not likely to think of the possibility of a dispute at this stage, nor is the consumer likely to envisage that he or she may need an avenue of redress later on. In recognition of this fact the law in some jurisdictions restricts the enforceability of pre-dispute arbitration clauses.

By contrast, *after* a dispute has arisen, the consumer is likely to think about different dispute resolution options and if, at that point, he or she chooses to renounce the right to seek justice in the court, but to opt for a specific arbitration scheme instead, then there is no reason why the law should interfere with such a choice.

Therefore, most laws restrict (in some way) the enforceability of pre-dispute arbitration clauses against a consumer, but only few jurisdictions do not allow a B2C arbitration agreement *after* the dispute has arisen.⁸

APPLICABLE LAW [4]

The question of whether a B2C arbitration agreement is enforceable against a consumer can arise in different contexts and this raises the question of which law will apply to the question of whether the arbitration agreement is enforceable or not.

First of all, this question may arise when the consumer starts litigation before his or her national court and the defendant business claims that the court has no jurisdiction because of the arbitration agreement. In this situation the court may apply the law of the forum (*ie* its national law) on the basis of mandatory consumer protection law overriding the law of the arbitration agreement.⁹

⁸ G Kaufmann-Kohler, T Schultz *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International The Hague 2004) 173; French Civil Code, Art.2061 states that domestic pre-dispute arbitration agreements with consumers are invalid, see below for the position in the UK and the US.

Secondly the question may also arise before the courts at the seat of the arbitration, if the consumer challenges the jurisdiction of the arbitration tribunal, under the law chosen by the parties or the law of the seat.¹⁰

Finally once an award (or a judgment) has been rendered, the issue may again arise in enforcement proceedings at the place where the defendant has assets. Again the enforcement court is likely to apply the law chosen by the parties¹¹ and/or the provisions of the New York Convention.¹²

It should also be pointed out that Article 6 (2) of Directive 93/13/EEC on unfair terms in consumer contracts provides that the parties may not avoid the consumer protection provisions by stipulating that the law of a non-Member State applies. Hence, if an English supplier, for example, provided in its (e-commerce) contracts with French consumers that US law (or the law of a particular US state) applied and if this contract also contained an arbitration clause, the French consumer would not lose his or her right to go to court.

SUBJECT-MATTER ARBITRABILITY [5]

Arbitrability refers to the question of whether a particular *type* of dispute may be submitted to arbitration. States may reserve certain types of disputes to the exclusive domain of the courts, for reasons of public policy or the public interest.¹³ If a particular category of disputes is not arbitrable, then a dispute falling into that category can never be submitted to arbitration, regardless of the consent of the parties. It seems that consumer disputes can be submitted to arbitration in principle, subject to conditions. In other words, the laws of most jurisdictions impose conditions on the giving of consent, but do not exclude consumer arbitration agreements from arbitra-

⁹ *Richard Zellner v Phillip Alexander Securities and Futures Ltd* [1997] ILPr 716, 724; see also section 89 (3) of the Arbitration Act 1996: 'whatever the law applicable to the arbitration agreement'.

¹⁰ A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (4th edition, Sweet & Maxwell London 2004) 148-151, G Kaufmann-Kohler, T Schultz fn 174

¹¹ *Ibid* and *Richard Zellner v Phillip Alexander Securities and Futures Ltd* [1997] ILPr 730 (QB) 736-738

¹² Where an award has been rendered and is enforced in a signatory state, enforcement may be refused if the agreement is not valid under the law chosen by the parties or failing this, under the law where the award was made, Article V (1) (a). If enforcement is being sought in a state which regards consumer disputes as non-arbitrable, then enforcement may also be denied under Article V (2) (a).

¹³ A Redfern, M Hunter fn ; G Kaufmann-Kohler, T Schultz fn 170

tion altogether.¹⁴ In jurisdictions allowing the enforcement of post-dispute arbitration agreements it can also not be said that consumer disputes are not arbitrable as such. Therefore consumer disputes are arbitrable in principle, but an arbitration clause is not invariably enforced.¹⁵

CONTROL OF UNFAIR

CONTRACTTERMS UNDER ENGLISH LAW [6]

In England and Wales an arbitration agreement concluded with a consumer (whether pre- or post-dispute)¹⁶ is considered to be unfair and hence unenforceable,¹⁷ if the claim does not exceed £5,000.¹⁸ Hence, under English law, if the amount in dispute is no more than £5,000¹⁹ a pre-dispute arbitration clause is automatically not binding on consumers, without the need for applying any of the tests set out in Directive 93/13/EEC on unfair terms in consumer contract, implemented by the Unfair Terms in Consumer Contracts Regulations 1999. If the amount in dispute exceeds that sum, the tests in the EC Directive and the implementing Regulations apply to assess whether the arbitration clause is binding on the consumer.²⁰

¹⁴ G Kaufmann-Kohler, T Schultz fn 170-172; for example the German civil procedure code (ZPO) imposes specific form requirements on consumer arbitration agreements in para 1031 (5) (contained in a separate signed document or have certification by a notary public), as to the position in England and the US, see next section

¹⁵ For example in France the law distinguishes between a pre-dispute arbitration clause ('clause compromissoire') and a post-dispute arbitration agreement ('compromis'). The pre-dispute arbitration clause is only valid between merchants and professionals, Code Civile Art.2061, Code Commercial Art.631

¹⁶ Section 89 (1) 'present or future disputes or differences (whether or not contractual)'.

¹⁷ Such a pre-dispute arbitration clause would not be binding on the consumer, but would be binding on the business supplier, see Regulation 8 (1) of the Unfair Terms in Consumer Contracts Regulations 1999

¹⁸ Arbitration Act 1996, s. 91 (1) and Unfair Arbitration Agreements (Specified Amounts) Order 1999/2167, Article 3. Section 1 (1) of the Consumer Arbitration Agreements Act 1988 used to contain a complete prohibition of all domestic pre-dispute arbitration clauses in consumer contracts, but this has been repealed by the 1996 Act.

¹⁹ This amount can be changed by statutory instrument. It seems that this amount tallies with the upper-limit for the small claims procedure. The policy behind this is that up to this amount it may be better for the consumer to choose the statutory small claims procedure, whereas for larger amounts in dispute, arbitration may actually be in the consumer's interest.

²⁰ Christopher Drahozal and Raymond Friel 'A Comparative View of Consumer Arbitration' (2005) 71 *Arbitration* 131-139, 134; OFT 'Unfair Contract Terms Guidance' (February 2001), paras 17.2, 17.3

DISCUSSION OF EC DIRECTIVE 93/13/EEC AND ITS IMPLEMENTATION IN THE UK [6.1]

The effect of the Directive is that certain consumer contract terms are considered unfair.

If a contract term is considered unfair, it is not binding on the consumer, but may still be binding on the business.²¹

The Annex to the Directive contains an illustrative list of unfair terms. The example (q) in the Annex to the Directive and the Regulations is the most relevant example of an unfair term:

‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions’.

The meaning of the phrase ‘arbitration not covered by legal provisions’ is not entirely clear. This could distinguish private arbitration from public forms of ‘arbitration’, such as small claims procedures or a statutory Ombudsman scheme. On the other hand it could refer to a distinction between arbitration based on the applicable law and arbitration where the arbitrator does not base his or her decision on strict law. It seems that the courts have interpreted the clause to mean the former.²²

In a recent case the ECJ held that if a pre-dispute arbitration clause is held to be unfair by the national court the award has to be annulled, even if the consumer has failed to raise the unfair nature of the term during the arbitration proceedings, the reason for which may be that the consumer is unaware of his or her rights or that the consumer is deterred from enforcing then on account of the costs which judicial proceedings would involve.²³

It is also interesting to note that EU Recommendation 98/257/EC also provides in Article 4 that consumers should not be bound by a pre-dispute arbitration clause.²⁴

²¹ Article 6 (1) of the Directive, Regulation 8 (1)

²² By implication: Landgericht Krefeld Case 6 O 186/95, Judgment of 29. April 1996 [1997] ILPr 716; *Picardi v Cuniberti* [2002] EWHC 2923 (QB) para 102

²³ Case C-168/05 *Mostaza Claro v Centro Movil* [2007] 1 CMLR 22 (ECJ) paras 29-30

²⁴ The Recommendation has of course no binding force.

In any case, Article 3 (3) of the Directive makes it clear that the examples in the Annex are only indicative and hence a case-by-case assessment has to be made in order to see whether (1) the arbitration clause has been individually negotiated, (2) is contrary to the requirement of good faith and (3) causes an imbalance in the parties' rights and obligations to the detriment of the consumer.²⁵ The courts must also take into account the nature of the goods and services for which the contract was concluded, the other terms of the contract and also all circumstances occurring at the point the contract was concluded.²⁶

A mere explanation or the pointing out of an onerous clause in the consumer contract may be necessary to ensure incorporation under the common law, but will not be sufficient to render the clause fair or, in fact, 'individually negotiated'. Pre-formulated terms, which the consumer has not been able to influence are not 'individually negotiated'.²⁷

The two core elements of the assessment to see whether a term is fair or unfair are the imbalance and the contrary to good faith requirements. These elements have been interpreted by the House of Lords in the case *Director-General of Fair Trading v First National Bank plc*.²⁸ Lord Bingham described the imbalance test by the question: is the term weighted in favour of the supplier so as to tilt the parties' rights and obligations under the contract?²⁹ Lord Millett, in the same case, approached the assessment from a practical standpoint by asking whether, the parties would have accepted the term, if their attention had been drawn to the term.³⁰ This assessment has both a procedural and substantive element and is not limited to an inquiry of whether the term has been brought to the consumer's attention, but in addition whether it is substantially fair.³¹ The next paragraphs will analyse the meaning of substantial fairness.

²⁵ Article 3 (1) of the Directive and Regulation 5 (1) of the Unfair Terms in Consumer Contracts Regulations 1999

²⁶ Article 4 (1) of the Directive and Regulation 6 (1)

²⁷ Article 3 (2) of the Directive and Regulation 5 (2)

²⁸ [2002] 1 AC 481 (HL)

²⁹ At para 17

³⁰ At para 54

³¹ [2002] 1 AC 481 (HL) paras 17 (Lord Bingham), 36-37 (Lord Steyn)

FAIRNESS OF ARBITRATION

CLAUSES UNDER THE DIRECTIVE [6.2]

In the context of construction adjudication, *pre-dispute* adjudication clauses have been upheld, where the consumer had received competent and independent professional advice for example from the surveyor.³² In these cases the courts seem to have equated the requirement of good faith with the requirement that the consumer is fully informed about the consequences of adjudication and professionally represented.

By contrast in *Picardi v Cuniberti* the Court has held that an arbitration clause in a contract between an architect and a consumer is an onerous term which must be drawn to the specific attention of the consumer and that the term had not been validly incorporated.³³ The Court also held (*obiter*) that the arbitration clause was an unfair term and that it is an example of a significant imbalance to the detriment of the consumer³⁴, as it may hinder the consumer's right to take legal action.³⁵ In that case the consumers had not been professionally advised.

The litigation in the case of *Richard Zellner v Phillip Alexander Securities and Futures Ltd* before the German Landgericht (District Court) Krefeld and the English High Court is another instructive example. This case concerned an arbitration clause in an agreement with a consumer which has been held an unfair, and hence, unenforceable term. The claimant, a German consumer had been solicited by cold-calling into entering a futures and options agreement, under which he invested and subsequently lost a substantial sum of money. One of the clauses in the agreement provided for arbitration in London before the London Court of International Arbitration under English law.

The German court applied German mandatory consumer protection law and held that the term was unfair as it deprived the consumer of access to his local court and since the term was hidden in small print extending over

³² *Allen Wilson Shopfitters and Builders v Buckingham* [2005] EWHC 1165 (TCC) para 43; *Westminster Building Company Limited v Beckingham* [2004] BLR 163 (TCC) para 31

³³ [2002] EWHC 2923 (QB) para 127

³⁴ [2002] EWHC 2923 (QB) para 128

³⁵ *ibid*

several pages, it had the effect of 'duping' the consumer.³⁶ The claimant won the case and moved to enforce the judgment in England by registering it with the English High Court. The defendant appealed against the Master's Order for registration, once more arguing that the German Court had no jurisdiction because of the arbitration agreement. On appeal, the English High Court also was called upon to assess the validity of the arbitration agreement, this time under English law. Like the German Court, it came to the conclusion that the arbitration agreement was invalid.³⁷

It is clear from this discussion that an arbitration clause can be an unfair term, depending on the circumstances, as it may deprive the consumer of access to national courts and application of mandatory consumer protection norms. Some of the English cases have made a distinction between a professionally advised consumer who would be bound by the arbitration clause, and a consumer, who is not advised, and hence would not be bound. The validity of this distinction is doubtful, since the purpose of the regulation of unfair contract terms is not merely to ensure that the consumer is properly informed. The concern of the legislation is also to counterbalance the power imbalance between consumers and businesses and the one-sided imposition of standard terms. To focus merely on information ignores the requirement of fair dealing, which in the arbitration context should mean that the consumer *voluntarily* enters into the arbitration agreement.

However it is important not to make too much of the case law based on construction cases, as the interpretation of what amounts to an unfair term depends on the context. The courts may take a different view of consumers bound by arbitration clauses in e-commerce disputes. For claims above the £5000 threshold, it is ultimately not clear whether a pre-dispute arbitration clause, for example contained in standard terms on a website, would be

³⁶ Landgericht Krefeld Case 6 O 186/95, Judgment of 29. April 1996 [1997] ILPr 716, 724; the Court applied the German law and referred to Directive 93/13 on unfair terms in consumer contracts, which at that point had not yet been implemented into German law.

³⁷ [1997] ILPr 730 (QB) 736-738; the English Court did not refer to Directive 1993/13 on unfair contract terms which at that point had not been implemented in the UK. Instead it based its findings that the arbitration agreement was invalid on s. 1 (1) of the Consumer Arbitration Agreements Act 1988, which provided that pre-dispute consumer arbitration agreements were unenforceable. Section 2 (a) of the Act limited this to domestic agreements- however the Court found that section 2 (a) was discriminatory against EU citizens and hence should not be applied. The Consumer Arbitration Agreements Act 1988 and its blanket prohibition on pre-dispute consumer arbitration agreements has been repealed by the Arbitration Act 1996.

binding on the consumer. If it deprives the consumer of the law applicable in the consumer's country of residence and if it refers the consumer to form of commercial arbitration not geared towards the needs of consumers, it is probable that the courts will strike down such a clause. However, there is also a chance that, if the e-commerce consumer was aware of the significance of the clause and if the arbitration procedure provided for envisages a suitable and fair process, English courts may find that the clause was not unfair.

It is argued here that the courts will interpret the Regulations to see whether the consumer has not only understood the arbitration clause, but also whether he or she voluntarily agreed to it, on a case-by-case analysis.

Therefore English law restricts the use of pre-dispute arbitration clauses considerably, thus acknowledging that consumers must be 'protected' from the lesser due process standards of arbitration and be given the choice to go to court. But the outcome depends, in proper common law fashion, on all the circumstances of the case.

CONTROL OF ADHESION CONTRACTS UNDER US (STATES') LAW [7]

By contrast, in the US, arbitration clauses in a written contract with a consumer are usually enforceable.³⁸ There is a strong presumption in favour of arbitration under the Federal Arbitration Act.³⁹ This has been shown in cases concerning specific *state* consumer protection legislation providing for mandatory, non-waivable consumer rights, where the courts have validated the arbitration clause, even if it had the effect of depriving the consumer of these rights.⁴⁰

³⁸ T Carbonneau *Cases and Materials on the Law and Practice of Arbitration* (2nd edition Juris Publishing 2000) 19; *Allied-Bruce Terminix Cos v Dobson* 513 US 265, 115 S Ct 834 (1995) 281-282

³⁹ 9 USC § 2, essentially providing that an arbitration agreement 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'. However *Jean Sternlight* has found that this preference for arbitration was not part of the original intent of Congress, but a myth developed by later courts out of a misguided policy to deal with overburdened courts, J Sternlight 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (Fall 1996) 74 *Washington University Law Quarterly* 637-712, 644-656, 660-674, similar M Budnitz 'Arbitration of Disputes between Consumers and Financial Institutions: A Serious Threat to Consumer Protection' (1995) 10 *Ohio State Journal on Dispute Resolution* 267-342, 289-290

However, under general state contract law, a term in a consumer contract can be unenforceable, if it is procedurally and substantially unconscionable. This doctrine of unconscionability equally applies to arbitration agreements, notwithstanding the Federal Arbitration Act's pro-arbitration stance.⁴¹

Court decisions finding arbitration agreements unconscionable and unenforceable have been relatively common in the state and federal courts in California. A term is procedurally unconscionable if it is in a contract of adhesion, which is a standard term contract drafted by a party with a superior bargaining position.⁴² However, the mere fact that an arbitration clause is contained in a standard contract does *not* make the arbitration agreement unenforceable against the consumer.

An additional factor is required in that the term must also be *substantially* unconscionable.⁴³ Substantive unconscionability is concerned with the one-sided nature of the contract and its oppressiveness, looking at the actual effects of the challenged provision.⁴⁴

Such one-sidedness can stem from the fact that the consumer has to bear an excessive filing-fee, the fact that the consumers cannot resort to class-action or that the process is confidential, hence enhancing the repeat-player effect.⁴⁵ A clause restricting the consumer's avenue of redress to arbitration, while allowing the company the choice to litigate would also be invalid for the same reason that it is one-sided.⁴⁶

The courts have held in several decisions⁴⁷ that an arbitration agreement in a consumer contract that forces the consumer to incur *excessive* arbitration

⁴⁰ *Commerce Park at DFW Freeport v Mardian Constr Co* 729 F.2d 334, 338-339; 39 Fed.R.Serv.2d 134 (5th Cir 1984); *Marley v Drexel Burnham Lambert Inc* 566 F Supp 333, 335 (1983 ND Texas), *Ting v AT&T* 319 F3d 1126, 1147-1148 (9th Cir Cal 2003) (arbitration clause held unenforceable for other reason)

⁴¹ Court decisions finding arbitration agreements unconscionable and unenforceable have been relatively common in the state and federal courts in California, see T Carboneau and *Materials on the Law and Practice of Arbitration* (2nd edition Juris Publishing 2000) 27

⁴² See, eg *Ting v AT&T* 319 F3d 1126, 1148 (9th Cir Cal 2003),

⁴³ *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 167-168 (5th Cir 2004)

⁴⁴ See, eg *Ting v AT&T* 319 F3d 1126, 1149 (9th Cir Cal 2003)

⁴⁵ *Ting v AT&T* 319 F3d 1126, 1151-1152 (9th Cir Cal 2003) but different in *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 175-176 (5th Cir 2004)

⁴⁶ *Iberia Credit Bureau v Cingular Wireless LLC, Sprint Spectrum Company, Centennial Wireless* 379 F3d 159, 168-169 (5th Cir 2004)

fees is unconscionable. For example, in the much-cited case of *Brower v Gateway Inc*⁴⁸ involving the purchase of a personal computer and related software products⁴⁹, the arbitration agreement stipulated arbitration before the International Chamber of Commerce Court of Arbitration in Paris. The ICC advance fee for the claim was the amount of US\$ 4,000, of which US\$ 2,000 were non-refundable. The New York Appellate Court held that the arbitration agreement was unenforceable and remanded the case back to a lower court to encourage the parties to find an appropriate arbitration procedure for their small claims dispute. In the US, the American Arbitration Association has introduced specific fee schedules for consumer disputes.⁵⁰ Likewise the National Arbitration Forum has a special small claims fee.⁵¹

In another line of cases the courts have held an arbitration clause to be unenforceable against a consumer, if it prevented consumers to resort to class action, which existed as a right under state law.⁵²

In summary it can be said that if the arbitration agreement provides for a basic accessible and affordable forum, it will be enforced against a consumer. The underlying approach in the US is that arbitration is seen as effective as court proceedings in adjudicating consumer disputes and that arbitration may be in the parties' and society's interest.⁵³ Hence an arbitration clause in standard form in a B2C e-commerce contract is likely to be enforceable.

⁴⁷ *Brower v Gateway2000 Inc* 676 N.Y.S. 2d 569, 572 (1998); *Green Tree Financial v Randolph*, 531 US 79, 81; 121 S.Ct. 513, 517 (2000) (in this case the US Supreme Court accepted that prohibitive costs may invalidate an arbitration agreement against a consumer, but the Court was not convinced that the petitioner would in fact incur such costs and therefore held that the arbitration clause was enforceable); *Knepp v Credit Acceptance Corp.* 229 B.R. 821, 838 (1999), *Patterson v ITT Consumer Fin. Corp.* 18 Cal. Rptr. 2d 563, 565-567 (1993), *Gutierrez v Autowest Inc* 114 Cal.App.4th 77, 86 (Cal App 2003), *Ting v AT&T* 319 F3d 1126, 1151 (9th Cir Cal 2003)

⁴⁸ *Brower v Gateway2000 Inc* 676 N.Y.S. 2d 569, 572 (1998)

⁴⁹ The value of the claim was on average about US\$ 1,000.

⁵⁰ see the Arbitration Rules for the Resolution of Consumer Related Disputes of 15. March 2001, the consumer must pay a fee of US \$ 125 (for small claims under US \$ 10,000).

⁵¹ For claims under US\$ 15,000- see http://www.arb-orum.com/arbitration/NAF/Code_linked/apdx_c.htm

⁵² *Ting v AT&T* 319 F3d 1126, 1150 (9th Cir Cal 2003); *Ingle v Circuit City Stores* 328 F3d 1165, 1175-1176 (9th Cir 2003); *Szetela v Discover Bank* 118 Cal Rptr 2d 862, 867-868 (Ct App 2002); *Discover Bank v Superior Court* 36 Cal4th 148, 162 (2005); *Dana Klussman v Cross Country Bank* 134 Cal App 4th 1283, 1291, 36 Cal Rptr 3d 728, 733-734 (Cal App 2005) but different: *Charles Provencher v Dell Inc* 409 F Supp 2d 1196 (US District Court CD California 2006).

⁵³ T Carbonneau fn 24 19

Nevertheless, where an arbitration agreement in an adhesion contract deprives the consumer of access to a forum to vindicate his or her rights, an arbitration clause may be struck out. Hence some restrictions against consumer arbitration agreements exist also under the US approach.

CONCLUSION [8]

As should have become apparent from the preceding discussion, in the UK there are stricter controls on the use of pre-dispute arbitration clauses than in the US. It seems that on this side of the Atlantic, there is a presumption that a pre-dispute arbitration clause in the standard terms and conditions of a B2C contract would not be enforceable (even for claims above the £5000 threshold). In the US there has been the reverse presumption that arbitration clauses in consumer contracts are enforceable, unless there are specific circumstances which render such clauses unconscionable.

Summarising the foregoing analysis it can be said that the emphasis in the UK is to see whether the consumer has been 'duped' into agreeing to arbitration, which will be the case in many standard form contracts between large corporations and consumers. For claims under £5000 an arbitration clause is invalid on the basis that consumer have access to a special, informal court procedure in the 'Small Claims Court'. This rule does not take into account the need for dispute resolution in cross-border e-commerce cases. By contrast in the US the courts seem to examine whether the particular arbitration scheme is appropriate and fair to consumers in all the circumstances of the case.

However, the difference between the UK and the US approach is more a question of degree. The law in this area is changing and the dynamics of the technological changes and changes in consumer behaviour engendered by e-commerce may well mean that US law and UK law will be converging in this matter in the long run.

In the US some of the courts and academic scholars⁵⁴ have recognised that mass arbitration of consumer claims may lead to concerns about due process, whereas in the UK the courts may eventually recognise that (in particular) cross-border litigation for small e-commerce claims may be too ex-

⁵⁴ See for example W Park *Procedural Evolution in Business Arbitration* (Oxford University Press Oxford 2006) 22-23

pensive and arbitration may fulfill a useful function for some e-commerce disputes, provided the arbitration process is geared to towards consumers' needs.

One of the main limiting factors here is the scarcity of fair and reliable arbitration schemes for e-commerce consumer disputes in the UK. While some public and private arbitration (and other Alternative Dispute Resolution) schemes are operating successfully in the UK it is equally true to say that coverage is extremely patchy and in particular that for e-commerce disputes there is only very limited coverage.⁵⁵ Most provision of arbitration is specific to a particular sector or a provider's membership in a scheme.⁵⁶ In the UK, there is no organized, general and binding arbitration scheme, open to all e-commerce disputes.

It could be argued that if there were arbitration schemes, which are fair, reliable and suitable for the needs of consumers, then the courts in the UK (and other EU countries) may drop their hostile approach to arbitration. It is doubtful whether standard commercial arbitration procedures provide due process for consumers and therefore the question arises what shape consumer arbitration should take. This is, however, a topic for a separate examination.⁵⁷

As the law in the UK stands now the only option for e-commerce businesses is to encourage their consumer customers to agree to arbitration after a dispute has arisen.

⁵⁵ M Doyle, K Ritters and S Brooker *Seeking Resolution* Research Report published by the DTI and the National Consumer Council in January 2004 URN 03/1616, p. 1 (in respect of ADR generally) and p. 13

⁵⁶ For example there are specific arbitration schemes for consumers run by IDRS, see <http://www.idrs.ltd.uk/Business/ServiceList.asp>

⁵⁷ See the author's forthcoming book, "Cross-border Internet Dispute Resolution", Cambridge University Press ISBN 9780521896207